82-1536

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1982

NO._____

LITTON SYSTEMS, INC.,
Petitioner,

v.

JOHN BOYD CHASTAIN, JR.,
Administrator of the Estate of
MARILYN GAIL CHASTAIN, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Whether, under the common law of the State of North Carolina, corporations can be held liable for the actions of one of its adult employees, where that employee, against company policy, consumes alcohol at a company-sponsored party held at the company plant, leaves the plant driving his own vehicle, and approximately one hour and twenty minutes later runs a red light and collides with another vehicle, killing the passengers in that second vehicle.

I N D E X

TABLE OF CASES

STATUTES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

LITTON SYSTEMS, INC., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on 2 December 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 694 F.2d 957 and is printed in Appendix A hereto, infra, pages 3-20. The Judgment and Memorandum of Decision of the United States District Court for the Western District of North Carolina reported at 527 F.Supp. 527 and is printed in Appendix A hereto, infra, pages 21-38.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on 2 December 1983. A timely petition for

rehearing was denied on 4 January 1983, and said denial is printed in Appendix A, infra, page 1. The jurisdiction of the Supreme Court is invoked under 28 U.S.C.S. section 1254.

QUESTIONS PRESENTED

Whether, under the common law of the State of North Carolina, corporations can be held liable for the actions of one of its adult employees, where that employee, against company policy, consumes alcohol at a company-sponsored party held at the company plant, leaves the plant driving his own vehicle, and approximately one hour and twenty minutes later runs a red light and collides with another vehicle, killing the passengers in that second vehicle.

STATUTES INVOLVED

There is no "dram shop" in North Carolina, nor is there any such statute imposing civil liability under the facts here presented. North Carolina General

Statute 4-1 provides as follows:

> "All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

STATEMENT OF CASE

I. Procedural Background

Plaintiff, Administrator of the Estate of Marilyn Gail Chastain, instituted this wrongful death action against defendant company on 5 August 1980 in Superior Court, Cherokee County. By stipulation, the complaint was later amended to show the correct name of the defendant company.

On motion of the defendant, the cause was removed to United States District Court for the Western District of North Carolina on grounds of diversity. Defendant Litton filed answer on 28 November 1980, the parties

conducted discovery, and on 4 May 1981 Litton filed a motion for summary judgment. On 30 September 1981 the trial court granted summary judgment in favor of Litton and the Administrator gave notice of appeal.

II. Factual Background

Litton operates a manufacturing plant producing and selling electronic precision motors and components in Cherokee County, North Carolina, employing, at all time relevant to this action, approximately 800 workers. At Christmas time each year, Litton provides various bonuses to its employees, such as the giving to each employee of a cash bonus, door prizes and Christmas turkeys. A Christmas luncheon was also scheduled annually for the enjoyment of the employees. In 1979, this annual luncheon popularly called "Rebellion Day" was scheduled for Friday, December 21, the beginning of the company's Christmas holidays. The menu for the luncheon is quite

lengthy, but it is noteworthy that only non-alcoholic beverages were served by the Company. No person in charge of any party fund or any other funds of defendant purchased alcoholic beverages for consumption by Litton's employees on 21 December 1979. This was in keeping with the long-standing company policy prohibiting the consumption of alcoholic beverages on company premises. The Company did not provide any alcoholic beverages for the luncheon, did not encourage or authorize any employee to bring intoxicants on to its premises, and at the time of the luncheon was not aware of the presence of any such intoxicants on the premises.

George Beck, an adult employee of the Company, was on Company grounds on the morning of 21 December 1979, ostensibly to attend the Christmas luncheon. In fact, Beck and several fellow employees apparently staged their own unauthorized party in the

rear building of Defendant's facility. This party was not given by the Company and was held at the same time as the Company luncheon. Several employees, including George Beck, had purchased and brought on Company premises, without the Company's prior knowledge or approval, alcoholic beverages which were consumed at this unauthorized party.

After attending the unauthorized party in the rear building, Beck clocked out of the plant at 10:00 a.m. At about 10:30 a.m. Beck passed by the plant in his van and was flagged down by a fellow employee, David Taylor, and asked if he needed someone to drive him home. Beck replied that he was fine and refused an offer to come inside for a cup of coffee. Thereafter Beck drove away, and approximately one hour and twenty minutes later, at some distance from the plant, ran a red light and struck an automobile occupied

by two women, both of whom were killed. This action by the Administrator of the Estate of one of the women, Marilyn Gail Chastain, was filed against Litton, charging the Company with wilful, wanton, unlawful and grossly negligent acts.

III. The Rulings Below

The District Court[1/] stated the issue in the case as "whether a social host who gratuitously furnishes alcohol to an able-bodied adult is liable for personal injuries and death inflicted on an innocent third party by that intoxicated adult." App. at 28. The Court recognized that this was a question of first impression in North Carolina, and that common law principles controlled its resolution. Quoting various authorities, the District Court wrote as follows:

> At common law it is not a tort to sell or give intoxicating

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1/ Chastain v. Litton, 527 F.Supp. 527 (W.D.N.C. 1981)

liquor to an able-bodied person and there is no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person drinking the liquor. The reason for the rule is that the consumption of the liquor, and not the furnishing of it, is the proximate cause of the injury.

. . .

In the light most favorable to the Plaintiffs, the evidence shows that Litton through its employees furnished alcohol to Beck, allowed him to become intoxicated and knowingly permitted him to leave in his van in the intoxicated state. Thereafter, within one hour and twenty minutes and several miles from Litton's plant, Beck while operating his own motor vehicle collided with a motor vehicle occupied by Plaintiffs' decedents causing injuries from which they died.

. . .

In the absence of a controlling North Carolina statute, or case, this Court will follow the common law rule and concludes that the Defendant Litton as a social host is not liable for the personal injuries and deaths of the Plaintiffs' intestates caused by the intoxicated George Beck to whom Litton furnished alcoholic beverages. The proximate cause of the injuries and

> deaths was the voluntary consumption of alcohol by an able-bodied adult, and not the furnishing of the alcohol by the Defendant.

In response to Plaintiff's contentions that Litton violated certain alcohol control statutes of the State of North Carolina, the district court noted that there was no allegation or evidence that Litton was in the business of selling or distributing alcoholic beverages for pecuniary profit. The district court determined therefore that Litton was "at worst a social host providing its employees with Christmas cheer and hospitality." App. at 34. Again, at common law, the furnishing of alcoholic beverages is not the proximate cause of the later injury, and thus even taking the facts in the light most favorable to the Plaintiff no liability on the part of Litton could be established under any set of facts.

Finally, replying to Plaintiff's argument that for every wrong a legal

remedy is provided, the district court noted that Beck has been given an active prison sentence as a result of his criminal conduct resulting in Marilyn Gail Chastain's death and that recovery for her wrongful death had already been gained from Beck.

REASONS FOR GRANTING THE WRIT

Writ of certiorari should lie in this cause for the reason that the Court of Appeals for the Fourth Circuit has decided an important question of state law in a way in conflict with the common law of the State of North Carolina. That the question decided is an important question is clear. The decision of the Court of Appeals that a cause of action at common law lies under the facts here presented will have significant impact on all future litigation involving this subject matter. It must be recognized that Court of Appeals has created a cause of action where before none existed, despite the absence of any North

Carolina statute or case law creating such right. Furthermore, the cause of action so created goes far beyond the scope of the causes of action generally found previously even in states where dramshop acts are in force. The opinion of the Court of Appeals seriously affects the liability of this Defendant, but, more importantly, it makes potentially liable an endless class of corporations, and perhaps even individuals, who stage a benefit for employees in a social setting but are to be found potentially liable because the social event arises from a business context. The company picnic or dinner or dance are familiar instruments of good cheer in this country, but after the opinion of the Court of Appeals in this case all sponsors of such events must be on notice that they may be liable for the criminally negligent acts of their employees. Such liability could lie even if, as in this case, the sponsor

did not furnish or condone the presence of the alcohol consumed even if, as in this case, the person attending the event engaged in criminal conduct between the time of leaving the party and the time of the event; even if, as in this case, an hour and twenty minutes elapsed between the time the employee left the event and committed the tort complained of. That is the full scope and effect of the opinion of the Court of Appeals.

The most succinct statement of a state court within the Fourth Circuit on this issue is found in State v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951);

> "Apart from statute, the common law knows no right of action against a seller of intoxicating liquors, as such, for 'causing' intoxication of the person whose negligent or wilful wrong has caused injury. Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor. ...

Id. at 254.

Elsewhere the Court recognized that whether such a cause of action should be created was a question more properly reserved for the state legislature.

> "[W]e should virtually usurp legislative power if we should declare plaintiff's contentions to be the law of Maryland. In the course of the last hundred years there probably has seldom, if ever, (except during prohibition) been a regular session of the General Assembly at which no liquor laws were passed. On few subjects are legislators kept better informed of legislation in other states. In the face of the flood of civil damage laws enacted, amended and repealed in other states and the Volstead Act - and of the total absence of authority for such liability, apart from statute - the fact that there is now no such law in Maryland expresses the legislative intent as clearly and compellingly as affirmative legislation would." Id. at 256.

So it is here. The Court of Appeals for the Fourth Circuit has abrogated the common law rule in a way which only a state legislature has the power to do. Despite whatever strong public policy considerations

the Court felt supported such a result, petitioner submits that stronger considerations of public policy mandate that the decision of the Court of Appeals be reviewed by this Honorable Court. In the absence of such review, the opinion of the Court of Appeals will improperly and incorrectly have a tremendous and deleterious effect on both the rights of defendants such as this petitioner and on the common law.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Fourth Circuit. In the event that the Petition is granted, Petitioner prays that the judgment of the Court below be reversed and that the decision of the District Court be reinstated.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2034

John Boyd Chastain, Jr.,
Administrator of the Estate
of Marilyn Gail Chastain,
Deceased,
Appellant,

-v-

Litton Systems, Inc.,
Appellee.

O R D E R

Upon consideration of the petition for rehearing filed by Litton Systems, Inc.;

With the concurrence of Judge Murnaghan and Judge Cacheris, IT IS ADJUDGED AND ORDERED that the petition for rehearing is denied.

Denial, however, is without prejudice to the right of Litton Systems, Inc., to file a motion under Fed. R. Civ. P. 60(b) should pending litigation in North Carolina ultimately establish that state law precludes recovery in this case. See Standard Oil Co. v. United States, 429 U.S. 17 (1976). At its discretion, the district court may

stay further proceedings pending resolution of the pertinent legal issues in the North Carolina courts.

Denial is also without prejudice to Litton's claim, first presented in the petition for rehearing, that Chastain's recovery against Beck precludes an action against Litton on the issue of respondeat superior. While reference to the plaintiff's recovery was mentioned in another context in the district court's opinion and the briefs, the asserted preclusive effect of the action against Beck was neither considered by the district court nor argued on appeal.

/s/
John D. Butzner, Jr.
Senior Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2034

John Boyd Chastain, Jr.,
Administrator of the Estate of
Marilyn Gail Chastain, deceased,
Appellant,

-v-

Litton Systems, Inc.
Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Bryson City. Woodrow W. Jones, Chief Judge.

Argued March 2, 1982 Decided December 2, 1982

Before MURNAGHAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and JAMES C. CACHERIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Herbert L. Hyde, (Herbert L. Hyde, P.A., on brief) for appellant; Landon Roberts, (Roberts, Cogburn, & Williams on brief) for appellee.

BUTZNER, Circuit Judge:

The administrator of the Estate of Marilyn Gail Chastain, deceased, appeals from the district court's grant of summary judgment dismissing his wrongful death claim against Litton Systems, Inc.[1] We vacate the order of dismissal and remand the case for trial.

I.

George Beck, a Litton employee, drove through a red traffic light and struck the car Chastain was driving. Earlier in the day, Beck had attended a Christmas party that Litton sponsored for 861 of its employees. The affair, held on Litton's premises, began at approximately 8:00 a.m. and continued during normal working hours. All of the employees were required to check in by 8:00 a.m. in order to be paid for that

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1. Chastain v. Litton Systems, Inc., 527 F.Supp. 527 (W.D.N.C. 1981). The action was filed in a state court and removed by Litton on the ground of diversity jurisdiction.

day, but they could leave at any time. At Litton's machine shop Beck and other employees drank alcoholic beverages, and a number of them became intoxicated.

Summarizing the evidence in the light most favorable to Chastain, the district court stated:

> (T)he evidence shows that Litton through its employees furnished alcohol to Beck, allowed him to become intoxicated and knowingly permitted him to leave in his van in the intoxicated state. Thereafter, within one hour and twenty minutes and several miles from Litton's plant, Beck while operating his own motor vehicle collided with a motor vehicle occupied by (Chastain) causing injuries from which (she) died. 527 F.Supp. at 531.[2]

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2. Litton disputes much of this summary, and, indeed, the record discloses many genuine issues of fact that must be resolved by a jury. For the purpose of reviewing the grant of summary judgment, however, we, like the district court, must view the evidence in the light most favorable to Chastain. Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979).

For the purpose of deciding the motion for summary judgment, the district court defined the issue as: "(W)hether a social host who gratuitously furnishes alcohol to an able-bodied adult is liable for personal injuries and death inflicted on an innocent third party by that intoxicated adult." It noted that the complaint did not allege "that Litton was in the business to sell or distribute alcoholic beverages for pecuniary profit." Consequently, it held that "Litton is at worst a social host providing its employees with Christmas cheer and hospitality." 527 F.Supp. at 530-31.

After establishing Litton's status, the district court ruled that under the common law "Litton as a social host is not liable for (Chastain's death) caused by the intoxicated George Beck to whom Litton furnished alcoholic beverages. The proximate cause of the (death) was the voluntary consumption of alcohol by an able-bodied

adult, and not the furnishing of the alcohol by the Defendant." 527 F.Supp. at 531.

The court also ruled that Litton did not violate any North Carolina alcoholic beverage control statutes and, consequently, it was not guilty of negligence per se. 527 F.Supp. at 532. Finally, it held that Litton was not liable under the doctrine of respondeat superior because at the time of the collision Beck had left the company's premises and was not acting within the scope of his employment. 527 F.Supp. at 532.[3]

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3. Litton asserts that Chastain's complaint does not allege liability under the doctrine of respondeat superior. In agreement with the district court, we conclude that a cause of action under this theory is alleged. "If on remand the parties continue to differ about the scope of the complaint, the court may consider putting this issue to rest by allowing the administrator to amend by adding more explicit allegations concerning this alternative theory of recovery.

II

This case presents questions of first impression in North Carolina, whose law governs this action. Although we can turn to no state statute or decision dispositive of the issues, we are not left without guiding principles of North Carolina law. Because North Carolina does not impose statutory liability on social hosts for the torts of their intoxicated guests, we accept the district court's conclusion that the common law is applicable. We also agree with the court that under common law a social host is not liable. But, contrary to the district court, we believe that these principles do not end the inquiry and justify summary judgment, for the parties differ over whether Litton was a social host.

Even where basic facts are not in dispute, summary judgment is inappropriate if the parties disagree about the inferences that properly may be drawn from the facts.

American Fidelity & Casualty Co. v. London & Edinburgh Ins. Co., 354 F.2d 214, 216 (4th Cir. 1965). Certainly it would be reasonable to infer from all the facts, including Litton's requirement that employees check into the plant while the party was in progress in order to earn a day's pay, that the affair was intended to promote Litton's business interests. Thus, whether Litton was simply entertaining its employees at a purely social gathering, or whether it was furthering a business purpose by improving working relationships, presented a jury question. See Harris v. Trojan Fireworks Co., 120 Cal.App.3d 157, 174 Cal. Rptr. 452, 456-57 (1981). The case on which Litton primarily relies, Miller v. Owens-Illinois Glass Co., 48 Ill. App.2d 412, 199 N.E.2d 300 (1964), does not require a different result, for there an employee's association, not the employer, was responsible for the party.

If the evidence establishes that Litton was acting as a social host, the common law of North Carolina bars recovery by Chastain's administrator. If, however, Litton was advancing its business interests and thus not acting as a social host, the question of liability requires further inquiry.

Courts differ about the liability of an employer whose employee, having become intoxicated at the employer's party, injures a third person. Compare Halvorson v. Birchfield Boiler, Inc., 76 Wash.2d 759, 458 P.2d 897 (1969) (employer absolved from liability) with Harris v. Trojan Fireworks Co., 120 Cal.App. 3d 157, 174 Cal. Rptr. 452 (1981) (employer not absolved). To reach a decision about which course the Supreme Court of North Carolina would likely take we must ascertain the state's policy toward persons who for business purposes dispense alcoholic beverages. This policy may be

found in the state's statutes governing the conduct of businesses licensed to sell mixed alcoholic beverages and in judicial precedents pertaining to the North Carolina law of torts.

III

In 1977, before Chastain was killed, North Carolina modified the common law by providing that it is unlawful for a person licensed to sell mixed alcoholic beverages knowingly to sell such beverages to an intoxicated person.[4] Other courts have held that violation of such a law subjects the licensee to liability for torts of the

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4. See 1977 N.C. Sess. Laws, 2nd Sess. 36, 39, ch. 1138, § 12, amending N.C. Gen. Stat. § 18A-30.

In 1981, chapter 18A was repealed, and in its place chapter 18B was substituted. A similar provision was enacted, § 18B-305(a), which provides:

It shall be unlawful for a permittee or his employee to knowingly sell or give alcoholic beverages to any person who is intoxicated.

intoxicated customer, notwithstanding the common law rule exculpating providers of alcohol.[5] The rationale of these decisions are safety regulations which impose a duty on the licensee, not only to the customer, but also to the public. Consequently, violation of such a law can give rise to an action for negligence against the licensee by a member of the public who has been injured by the intoxicated customer.

North Carolina follows the same rationale when an ordinance imposes a public duty. In Bell v. Page, 271 N.C. 396, 399-400, 156 S.E.2d 711, 715 (1967), the court said:

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5. See, e.g., Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973); Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964). See also: Restatement (Second) of Torts § 285 comment c and § 286 (1965). Contra Lewis v. Wolf, 122 Ariz. 567, 596 P.2d 705 (Ct.App. 1979); Felder v. Butler, 292 Md. 174, 438 A.2d 494 (1981); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966).

> The violation of a municipal ordinance imposing a public duty and designed for the protection of life and limb is negligence per se. However, to impose liability therefor it must be established that such violation proximately caused the alleged injury. The general definition of proximate cause, including the element of foreseeability, is applicable in determining whether the violation of such ordinance constitutes actionable negligence. ...
>
> "What is the proximate or a proximate cause of an injury is ordinarily a question for the jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury." (citations omitted)

We therefore conclude that the North Carolina Supreme Court would reach the same decision as the courts have imposed civil liability on a licensee who violates a law prohibiting the sale of alcoholic beverages to a person known to be intoxicated.

We agree with the district court that because Litton was not a licensee, it cannot be held liable under the laws governing the sale of alcoholic beverages. These laws and judicial precedents pertaining to them, however, disclose state policy toward persons

who dispense alcoholic beverages in capacities other than as social hosts.

If the jury were to find that Litton was not a social host, we believe that its liability should be governed by the law of torts as developed by the North Carolina Supreme Court. North Carolina subscribes to §§ 302 and 303 of the Restatement of Torts (1934).[6] Toone v. Adams, 262 N.C.

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6. § 302. Acts Involving Risk Of Either Direct or Indirect Harm.

A negligent act may be one which:
(a) starts a force, the continuous operation of which involves an unreasonable risk to another, or
(b) creates a situation which involves an unreasonable risk to another because of the expectable action of the other, a third person, an animal or a force of nature.

§ 303. Acts Intended or Likely so to Affect the Conduct of the other or a Third Person as to Involve Unreasonable Risk.

An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third person or an animal in such a manner as to create an unreasonable risk of harm to the other.

403, 409, 137 S.E.2d 132, 136 (1964). North Carolina has defined proximate cause as follows:

> In this jurisdiction, to warrant a finding that negligence, not amounting to a wilful or wanton wrong, was a proximate cause of an injury, it must appear that the tort-feasor should have reasonably foreseen that injurious consequences were likely to follow from his negligent conduct. ... It is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence. It is required only "that a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed." (emphasis in original)

Sutton v. Duke, 277 N.C. 94, 107, 176 S.E.2d 161, 168-69 (1970).

North Caroina also holds that the negligence of one tortfeasor cannot be insulated by the negligence of another so long as the negligence of the first plays a "substantial and proximate part in the injury. ... (T)he test by which the negligent conduct of one is to be insulated as a

matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." Watters v.Parrish, 252 N.C. 787, 796-97, 115 S.E.2d 1, 7-8 (1960).

Applying these authorities to Litton's conduct, assuming it is not a social host, we conclude that Litton was negligent if it failed to exercise ordinary care in furnishing, or permitting its employees to furnish, alcoholic beverages to Beck knowing that he had become intoxicated. Toone, supra, 137 S.E.2d at 136; Restatement of Torts §§ 302, 303 (1934). This negligence would be a proximate cause of Beck's collision with Chastain if Litton could have reasonably foreseen that Beck, while intoxicated, would probably drive his motor vehicle on a public street and cause a collision. Sutton, supra, 176 S.E.2d at 168-69. Under these circumstances, Litton would not be insulated by Beck's negligence. Watters,

supra, 115 S.E.2d at 7-8. These issues present factual questions that should be submitted to a jury.

We also conclude that summary judgment was inappropriate on the cause of action based on Litton's vicarious liability for Beck's negligence. We cannot accept Litton's argument that it is absolved from liability because Beck was not acting within the scope of his employment at the time of his collision with Chastain. This contention confuses negligence with proximate cause. It overlooks Beck's relationship with Litton when he became intoxicated, which we believe is the critical time for determining whether the doctrine of respondeat superior should be applied. Again, the initial issue is whether the party was purely a social occasion, or whether it was sufficiently related to Litton's business to bring Beck's attendance within the scope of his employment.

The North Carolina Supreme Court has succinctly stated the principles of the doctrine of respondeat superior. In Johnson v. Lamb, 273 N.C. 701, 707, 161 S.E. 2d 131, 137 (1968), the court said:

> If an employee is negligent while acting in the course of employment and such negligence is the proximate cause of injury to another, the employer is liable in damages under the doctrine of respondeat superior, notwithstanding the fact that the employer, himself, exercised due care in the supervision and direction of the employee, the employee's violation of instructions being no defense to the employer.

Applying these principles, we believe that the evidence, viewed in the light most favorable to Chastain's administrator, raises issues which should be submitted to a jury. They include: whether Beck's attendance at Litton's party and his consumption of alcoholic beverages could reasonably be considered to be within the scope of his employment; if so, whether his excessive drinking at the party constituted negligence on his part; and, if so, whether

his negligent intoxication continued until the time he collided with Chastain and constituted a proximate cause of the collision.

This is essentially the analysis of a similar situation found in Harris v. Trojan Fireworks, 120 Cal.App.3d 157, 165, 174 Cal. Rptr. 452, 457 (1981), where the court in summary said:

> We hold that plaintiffs have pleaded sufficient facts, which, if proved, would support a jury's determination that (the employee's) intoxication occurred at the (employer's) Christmas party and that his attendance at the party as well as his state of intoxication occurred within the scope of his employment. That he would attempt to drive home while still intoxicated and might have an accident was foreseeable.

V

We are aware, of course, that Litton disputes much of the evidence on which Chastain's administrator bases his case. This opinion therefore does not reflect any views about the ultimate merits of the controversy. Determination of the facts

and the inferences that reasonably can be drawn from them with respect to the issues of Litton's status, negligence, intervening negligence, proximate cause, and vicarious liability should be made by a jury. Summary judgment therefore was inappropriate. See Pierce v. Ford Motor Co., 190 F.2d 910, 913, 915-16 (4th Cir. 1951). The judgment of the district court is vacated and the case remanded for further proceedings consistent with this opinion. The administrator shall recover his costs.

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA

BRYSON CITY DIVISION
B-C-80-267

JOHN BOYD CHASTAIN, JR.,)
Administrator of the)
Estate of MARILYN GAIL)
CHASTAIN, Deceased,)
Plaintiff,)
)
-v-) JUDGMENT
)
LITTON SYSTEMS, INC.,)
Defendant.)

THIS MATTER was heard by the Court and the issues determined as will appear in a Memorandum of Decision filed simultaneously herewith.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's motion to dismiss which was treated as a motion for summary judgment be and the same is hereby allowed and the plaintiff's action is hereby dismissed with prejudice. The defendant shall recover its costs.

This the 30th day of September, 1981.

/s/ Woodrow Jones
Chief Judge

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA

BRYSON CITY DIVISION

JOHN BOYD CHASTAIN, JR., Administrator of the Estate of MARILYN GAIL CHASTAIN, Deceased	)	
Plaintiff,	)	B-C-80-267
-v-	)	
LITTON SYSTEMS, INC.,	)	
Defendant.	)	
and	)	
GRADY ALLEN INGLE, Administrator of the Estate of LUCILLE C. INGLE, Deceased,	)	
Plaintiff,	)	B-C-80-268
-v-	)	
LITTON SYSTEMS, INC.,	)	
Defendant.	)	

MEMORANDUM OF DECISION

The Plaintiffs, John Boyd Chastain, Jr. and Grady Allen Ingle, Administrators of the Estates of Marilyn Gail Chastain and Lucille C. Ingle, deceased, respectively,

and residents of North Carolina, instituted these diversity actions against the Defendant, Litton Systems, Inc., a Delaware corporation which owns and operates a manufacturing plant in Cherokee County, North Carolina, seeking compensatory and punitive damages under the North Carolina Wrongful Death Statute G.S. 28A-18-2. These lawsuits arise from a motor vehicle accident on December 21, 1979 in which a van driven by George Beck, the Defendant's employee, collided with an automobile occupied by Marilyn Gail Chastain, as driver, and Lucille C. Ingle, as passenger. Both women died as a result of the injuries sustained in said collision.

These matters are now before the Court upon the Defendant's motions to dismiss pursuant to Rule 12(b) and for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. A hearing on these motions was held by the Court in Bryson City

on July 20, 1981. For the purposes of this opinion the Court will consider the two cases together. After a careful consideration of the pleadings, affidavits, answers to interrogatories, briefs and argument of counsel the Court now enters its findings and conclusions.

The following facts are not in dispute. The Defendant, Litton Systems, Inc., hereinafter Litton, owns and operates a manufacturing plant in Cherokee County, North Carolina and is not engaged in the manufacture, sale or distribution of alcohol for pecuniary profit or for any other reason. On December 21, 1979, Litton hosted on its Cherokee County premises the annual pre-Christmas party for 861 of its employees called "Rebellion Day." Employees were to check in at or after 8:00 a.m., were to clock out at any time thereafter without performing any work, and were paid for a full eight hours of work. The party

schedule consisted of music, snacks, and non-alcoholic beverages served from 8:00 a.m. to 10:00 a.m. and a luncheon served from 10:00 a.m. to 12:00 noon. Litton had its security guards on duty and they were aware of the well established company policy not to allow alcohol beverages on the premises. George Beck, a twenty-five year old male employee of Litton clocked in after 8:00 a.m. and proceeded to the machine shop where someone had spiked the punch with alcoholic beverages and had brought into the machine shop some bottles of whiskey. He began drinking these beverages along with some of the other employees and then clocked out of the plant at 10:00 a.m. At about 10:30 a.m. Beck passed by the plant in his van and was flagged down by a fellow employee, David Taylor, and asked if he needed someone to drive him home. Beck replied that he was fine and refused an offer to come inside

to have a cup of coffee. Thereafter Beck drove away and approximately one hour and twenty minutes later and some distance from the plant ran a red light and struck the automobile occupied by the decedents.[1/] Litton admits that the security guards stopped six employees from driving from the plant and had other employees driven home because of their inebriated condition.

The Plaintiffs contend that the Defendant was negligent in furnishing or allowing alcohol on its premises and in permitting Beck to become intoxicated and to leave the premises in his van with the Defendant's knowledge of his intoxicated state. They further contend that Litton

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1/ George Beck was convicted in the Criminal Superior Court of Cherokee County on two involuntary manslaughter charges and was given an active sentence of seven to ten years and suspended seven to ten year sentence in the other and, in addition, ordered to pay the sum of $10,000 for the use and benefit of the two minor children of Lucille Ingle.

violated various North Carolina liquor laws and that these violations constitute negligence per se. The Defendant counters by denying that it furnished or allowed alcohol on its premises or that it violated any liquor laws. Further, it argues that even if the Defendant did furnish the alcohol, it is not liable in common law negligence for the wrongful acts of Beck.

The Court has considered matters outside the pleadings and therefore will treat the Defendant's Rule 12(b) motion to dismiss for failure to state a claim as a motion for summary judgment under Rule 56, F.R.C.P. Smith v. Blackledge, 451 F.2d 1201 (4th Cir. 1971). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), F.R.C.P. Even if certain facts are in dispute, summary judgment is appropriate if, considering the disputed facts in the light

most favorable to the party opposing the motion, the moving party is entitled to judgment as a matter of law. Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969); Jennings v. Edwards, 454 F.Supp. 770 (M.D.N.C. 1978); Wilson v. Continental Group, Inc., 451 F.Supp. 1 (M.D.N.C. 1978).

The issue is whether a social host who gratuitously furnishes alcohol to an able-bodied adult is liable for personal injuries and death inflicted on an innocent third party by that intoxicated adult.

This is a case of first impression in North Carolina. North Carolina does not have a dramshop act [2/] and the common law princi-

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2/ The legislatures of various states have enacted statutes, commonly known as civil damage or dramshop acts, which give a right of action to persons injured by an intoxicated person against the person selling or furnishing the liquor which caused the intoxication. See 45 Am.Jur.2d., Intox. Liquors § 361.

ples that have not been abrogated or repealed by statute are in full force and effect in this State. N.C.G.S. § 4-1; Mullen v. Sawyer, 277 N.C. 623, 178 S.E.2d 425 (1971).

At common law it is not a tort to sell or give intoxicating liquor to an able-bodied person and there is no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person drinking the liquor. The reason for the rule is that the consumption of the liquor, and not the furnishing of it, is the proximate cause of the injury. Alsup v. Garvin-Wienke, Inc., 579 F.2d 461 (8th Cir. 1978); Megge v. United States, 344 F.2d 31 (6th Cir. 1965); 45 Am.Jur., Intox. Liquors § 553.

The Court in Megge v. United States, supra, stated:

> The common law knows no right of action against a seller of intoxicating liquors, as such, for "causing" intoxication of the

> person whose negligence or wilful wrong has caused injury. Human beings, drunk or sober, are responsible for their own torts. The law (apart from [dramshop] statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor.
>
> State For Use of Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951).

Responding to the argument to create a common law duty on social hosts furnished alcohol, the Court, in Cartwright v. Hyatt Corp., 460 F.Supp. 80 (D.D.C. 1979), stated

> ... There is now no jurisdiction in the United States where, absent an explicit civil damage or "Dram Shop Act," a social host is held liable for having served liquor to an intoxicated adult who, as a result, causes harm to a third person.
>
> Valid policy considerations exist on both sides of this issue, and the Court is not prepared to adopt for the District of Columbia a rule not judicially imposed by any other court in any other jurisdiction.
>
> If such a rule is to become a part of District of Columbia law, the decision should appropriately be made by the legis-

> lature--as it has been done whereever the rule has been adopted. Id. at 82.

In the light most favorable to the Plaintiffs, the evidence shows that Litton through its employees furnished alcohol to Beck, allowed him to become intoxicated and knowingly permitted him to leave in his van in the intoxicated state. Thereafter, within one hour and twenty minutes and several miles from Litton's plant, Beck while operating his own motor vehicle collided with a motor vehicle occupied by Plaintiffs' decedents causing injuries from which they died.

There are no North Carolina cases on the point in question, but the Plaintiffs cite and rely upon a number of cases which they say support their contentions. Most of these cases are based upon recognized principles of law such as the duties owed by common carriers to their passengers and owners of premises to their customers or

invitees. One such case is the recent Supreme Court decision in Foster v. Winston Salem Joint Venture, et al., ____N.C.____, filed August 17, 1981, which seems to go further than any other North Carolina case on the question of foreseeability. But Foster is based upon the well recognized principle of law of the duty owed by the owners of business premises to their customers or invitees. The Court held in Foster that a jury question arises where the plaintiff, a customer of the defendants, owners and operators of the businesses and the shopping center, was criminally assaulted by third parties in the defendants' parking lot when there had been thirty-one similar incidents occurring in the shopping center within the year preceding the attack on plaintiff and the defendants had notice of such incidents. The Court held that "a jury could reasonably find that by providing only one guard to patrol a large parking

area during the busy shopping period five days before Christmas, defendants breached their duty to exercise reasonable care to maintain the shopping center premises in such a manner that they might be used safely by the customers invited thereon."

In the absence of a controlling North Carolina statute, or case, this Court will follow the common law rule and concludes that the Defendant Litton as a social host is not liable for the personal injuries and deaths of the Plaintiffs' intestates caused by the intoxicated George Beck to whom Litton furnished alcoholic beverages. The proximate cause of the injuries and deaths was the voluntary consumption of alcohol by an able-bodied adult, and not the furnishing of the alcohol by the Defendant.

The Plaintiffs further contend that the Defendant violated N.C.G.S. §18A-3(a) and §18A-30(5)(d), alcohol control statutes, by furnishing alcoholic beverages in an

unauthorized place, its manufacturing plant, and that these violations constitute negligence per se. N.C.G.S. §18A-3 states, "No person shall . . . sell . . . deliver, furnish, purchase or possess any intoxicating liquor except as authorized by this chapter . . ." and N.C.G.S. §18A-30(5)(d) makes it illegal for "any person, association or corporation to permit any alcoholic beverages to be possessed or consumed upon any premises not authorized by this chapter."

Considering the evidence in the light most favorable to the Plaintiffs, it is clear that the Defendant has not violated these statutes. For purposes of this motion, Litton is at worst a social host providing its employees with Christmas cheer and hospitality. There is no allegation or evidence that Litton was in the business to sell or distribute alcoholic beverages for pecuniary profit. The Court

finds that Litton's activities as a social host come within N.C.G.S. §18A-30(1) which in relevant part reads

> Possession and Consumption of Alcoholic Beverages at Designated Places.
>
> (1) Residence and Related Places--... A person may also possess and consume said alcoholic beverages, but not in view of the general public, on any private property not primarily engaged in commercial entertainment and not open to the general public at the time, when such person, association, or corporation has obtained express permission of the owner or person lawfully in possession of said property, and when said alcoholic beverages are consumed by said person, his family, his bona fide guest or bona fide guests of the association or corporation . . .

Litton did not violate the North Carolina alcohol con' .ol statutes and thus there was no negligence per se.

Furthermore, even assuming arguendo that Litton did violate the statutes and that the violations were negligence per se, the Plaintiffs must still show that the violation of the statutes was the proximate cause of the injury. Lutz Industries v.

Dixie Home Store, 242 N.C. 332, 88 S.E.2d 333 (1955); Ward v. Swimming Club, 27 N.C. App. 218, 219 S.E.2d 73 (1975). Under the common law rule, however, the furnishing of alcoholic beverages is not the proximate cause of the later injury and, therefore, the Plainitffs could not recover under negligence per se. See Keaton v. Kroger, 143 Ga.App. 23, 237 S.E.2d 443 (1977).

Finally, the Court finds that the Defendant also is not liable under the doctrine of respondeat superior. The employer is liable for the negligent or wilful acts or omissions of his employee while acting as such and within the scope of his employment. Wegner v. Delicatessen, 270 N.C. 62, 153 S.E.2d 800 (1967). It is elementary that an employer is not liable for injury due to the negligent or wilful acts or omissions of his employee when the employee has departed from the course of his employment and embarked upon a mission

or frolic of his own. Duckworth v. Metcalf, 268 N.C. 340, 150 S.E.2d 485 (1966); Travis v. Duckworth, 237 N.C. 471, 75 S.E.2d 309 (1953). Although the Defendant paid Beck for eight hours work on December 21, 1979, Beck performed no work on that day because of the "Rebellion Day" party. He clocked out of Litton's employment to begin the Christmas holidays, left Litton's premises, and one hour and twenty minutes later struck the decedents' automobile. Litton is not liable for its employee's acts after he has clocked out, is off their premises, and is not in the scope of his employment.

The Plaintiffs cite in their briefs the provisions in the North Carolina Constitution, Art. 1, Section 18, and the cases decided thereunder, that "for every wrong a legal remedy is provided." The Plaintiffs are not without a remedy for the wrong inflicted by George Beck. As set forth in a footnote herein Beck was convicted of two

counts of involuntary manslaughter in the Superior Court of Cherokee County and given an active prison sentence of from seven to ten years on one count and a seven to ten year sentence on the other count which was suspended upon the payment of $10,000 for the benefit of the children of Lucille Ingle. In addition, the Plaintiffs would have causes of action against Beck for damages for wrongful death. In fact, the Defendant alleges that such actions have already been filed and a recovery had.

The Court concludes that the Defendant is entitled to a judgment as a matter of law dismissing the Plaintiffs' actions and the motions for summary judgment will be granted. A judgment dismissing the action will be entered in each case.

This the 30th day of September, 1981.

/s/ Woodrow Jones
Chief Judge

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(c) of the United States Supreme Court, I hereby certify that on the 14th day of March, 1983, I mailed first class postage prepaid from Richmond, Virginia, forty copies of the foregoing Petition for Writ of Certiorari to the Clerk of the United States Supreme Court and three copies to Herbert L. Hyde, Esquire, Post Office Box 7266, Asheville, North Carolina 28807.

Susan S. Williams

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City of Richmond
State of Virginia

Subscribed and sworn before me
the 14th day of March, 1983.

Notary Public

My Commission expires October 18, 1986